

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE:	\$	
	\$	
PHONES FOR ALL, INC.,	\$	CASE NO. 99-38080-SAF-11
PREFERRED CARRIER SERVICES,	\$	CASE NO. 99-38082-SAF-11
INC.,	\$	
PREFERRED CARRIER SERVICES OF	\$	CASE NO. 99-38084-SAF-11
VIRGINIA, INC.,	\$	
	\$	(Jointly administered under
DEBTORS.	\$	Case No. 99-38080-SAF-11)

**MEMORANDUM OPINION AND ORDER**

Comm South Customer Corp. moves the court to authorize the payment of a break-up fee of \$100,000. Peter D. Sahagen and Sahagen Consulting Group, LLC, oppose the motion. The court conducted an evidentiary hearing on the motion on December 7, 2000. Because Comm South filed a supplement to its motion on December 6, 2000, the court allowed the parties until December 13, 2000, to file supplemental briefs. Sahagen filed a response to the supplement on December 14, 2000.

Comm South requests payment of the break-up fee pursuant to an order entered by this court on May 3, 2000, regarding a sale of assets of the estate pursuant to a plan of reorganization proposed by the creditors' committee. The motion raises a core

matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(A) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

By order entered May 3, 2000, the court provided, in relevant part:

IT IS THEREFORE ORDERED . . . that if (i) a Fiduciary Event as defined in the Letter Agreement . . . between the Committee and Comm South dated March 23, 2000 occurs, or (ii) substantially all of the Debtors' assets are sold to an entity other than Comm South (regardless of whether structured as an asset purchase, stock purchase, merger, etc.), and the sale to such other purchaser was not a result of Comm South's breach of the Letter Agreement, Buyer shall be reimbursed by the Debtors 100% of its out-of-pocket costs and expenses, including but not limited to legal fees incurred in connection with this transaction, which amount shall not exceed \$100,000. . . . Notwithstanding anything to the contrary as set forth in the prior sentence, the Breakup Fee shall not be payable (a) in the event of confirmation and consummation of the Debtors' proposed plan of reorganization, and (b) without approval of this Court as to the reasonableness of the fees and expenses requested by Comm South.

Prior to the entry of the written order, the court explained in its bench ruling on April 3, 2000, that a break-up fee for Comm South would not be justified if the court confirmed the debtors' proposed plan of reorganization. The debtors had filed a proposed plan. But the creditors' committee sought to file a competing plan with the Comm South purchase of the debtors' assets as an integral provision of the plan. The committee plan

included a bidding process. The court held that there would be no basis for a break-up fee if the creditor body favored and the court confirmed the debtors' plan. In that instance, the court explained, the creditors would have found that the debtors' plan was better for them and the committee plan would have added little to that process. However, if the committee's plan went forward and the court confirmed that plan with a bidder that outbid Comm South, then Comm South should be able to request a reasonable break-up fee.

The provision of the May 3, 2000, order that Comm South would not receive a break-up fee if the debtors' plan was confirmed must be read in the context of the April 3, 2000, bench ruling.

On December 7, 2000, the court confirmed a plan of reorganization filed by the debtors. The plan incorporated a bid for the debtors' assets submitted by Sahagen at an auction. The plan does not include the Comm South bid. As a result, Sahagen contends that Comm South may not receive the break-up fee.

The order entered May 3, 2000, following the bench ruling of April 3, 2000, references the debtors' then filed and existing proposed plan of reorganization. The court provided that if creditors supported that plan and the court confirmed that plan, Comm South would not receive a break-up fee. The debtors

withdrew that plan. That plan has consequently not been confirmed.

Instead, the debtors filed a motion to sell their assets, under 11 U.S.C. §363, to the highest bidder at auction. The court set the auction for June 29, 2000. On a parallel track, the committee filed and prosecuted its plan including the Comm South bid. Sahagen submitted the highest bid at the auction. Comm South did not pursue a bid at the auction. But Comm South continued to participate with its offer to purchase the debtors' assets through the committee's plan. The committee's plan did not receive the requisite creditor votes to be confirmed. With the creditors supporting the Sahagen bid at the auction as the best available offer for the debtors' assets, the debtors incorporated the Sahagen bid into a plan and prosecuted that plan.

In its bench ruling of April 3, 2000, the court contemplated that the committee's plan would include a bidding process. If that process resulted in Comm South being outbid, then Comm South could obtain a break-up fee. Functionally, the debtors' motion under §363 established a competing bidding process. The debtors and the creditors' committee agreed that the bidding would occur in the context of that motion. The auction process produced the Sahagen bid. With the Comm South offer before the creditors in the committee plan set for confirmation on the same day as the

auction, Comm South could have, but did not have to, bid separately in the auction. Creditors could and did weigh and assess which of the competing bids--Sahagen at the auction or Comm South in the committee plan--was the better bid. The creditors voted for the Sahagen bid. The process is the functional equivalent of the process contemplated by the court on April 3, 2000.

The court therefore finds, consistent with both the order entered May 3, 2000, and the bench ruling of April 3, 2000, that although the court confirmed a debtors' plan of reorganization, it did not confirm the debtors' plan of reorganization before the court on April 3, 2000. In addition, the court finds that Comm South had been outbid by Sahagen in a bidding process that was the functional equivalent of the bidding process contemplated by the committee's plan.

Sahagen also contends that a "Fiduciary Event" as defined in the letter agreement, per the order entered May 3, 2000, did not occur. Based on the testimony, the court finds that the Sahagen offer had a value to the estate greater than the \$200,000 threshold to result in a Fiduciary Event.

The court further finds, based on the testimony of Comm South's general counsel and senior vice president, that Comm South did not breach the letter agreement, but rather was

prepared to proceed with the purchase if the court confirmed the committee's plan.

Accordingly, pursuant to the order of this court entered May 3, 2000, Comm South may recover its reasonable fees and expenses incurred in connection with the contemplated transaction, not to exceed \$100,000.

Sahagen objects to the reasonableness of the requested fees and expenses. As supplemented, Comm South incurred fees and expenses greater than \$100,000. The court must determine the reasonableness of those fees and expenses, up to the \$100,000 limit.

The fees and expenses must have been "incurred in connection with this transaction," meaning the purchase of the debtors' assets through the committee's plan. Comm South may have incurred fees and expenses in connection with the bankruptcy case generally. Those fees and expenses may be reasonable. They may be appropriately incurred by Comm South and paid by Comm South. But, unless they were incurred in connection with the purchase of the assets through the committee's plan pursuant to the letter agreement, they are not included in the break-up fee.

By limiting the break-up fee to fees and expenses incurred in connection with the transaction, the court assured that the bankruptcy estate would only reimburse Comm South as a buyer protection, but would not reimburse Comm South for its general

expenses as a party in interest or its other business strategy related expenses.

Accordingly, fees and expenses incurred by Comm South in connection with preparing and negotiating its offer to purchase, preparing and negotiating the letter agreement, reviewing and monitoring the committee's plan which incorporated the letter agreement, attending the hearing concerning the letter agreement and plan, monitoring the plan process for the committee's plan, drafting an asset purchase agreement and closing documents, and attending the confirmation hearing on the committee's plan would all be covered by the court's order. However, fees and expenses for monitoring other aspects of the bankruptcy case and other client work, such as corporate work, would not be incurred in connection with the offer to purchase and would not be covered by the court order. Once Comm South submitted its proposal and the committee incorporated the proposal into the committee's plan, then the buyer protection of the break-up fee would be limited to the monitoring of that plan process. All other fees and expenses, however reasonably incurred by Comm South, including determining the position to pursue on the \$363 motion, would not pertain to the buyer protection of the break-up fee. Comm South may have determined that it was prudent for its business interests to request its counsel to perform these other services and to indeed pay counsel for those services, but that does not

mean those services were incurred in connection with the buyer protection of the break-up fee.

For example, work pertaining to the debtors' original plan did not relate to the letter agreement. Similarly, work pertaining to the \$363 auction did not involve developing, negotiating or submitting the letter agreement. The letter agreement had been submitted to the creditors for a vote in the committee's plan. If Comm South decided to bid separately in the \$363 auction, Comm South could have pursued that business strategy. But doing so would have no effect on the expenses it incurred to negotiate the letter agreement. Only those expenses are given buyer protection in the break-up fee.

Baker Botts L.L.P., as local counsel, and Greenberg Traurig, P.A., performed the following categories of services which the court holds do not pertain to the buyer protection of the break-up fee: obtaining employment, monitoring the case status, obtaining a claim, performing routine tasks such as filing a notice of appearance, arranging for telephonic appearances at a hearing or obtaining court documents, general bankruptcy research, settlement negotiations, working on the debtors' plan or plans, attending hearings not related to the committee's plan or Comm South's offer as contained in the committee's plan such as DIP financing or claims hearings, and other client work such as corporate structure, coordination, and regulatory matters.



Comm South reports considerable fees for this work, which is not covered by the break-up fee. Baker Botts, reporting in hours, incurred 27.3 hours of attorney and paralegal time for obtaining employment, status reports, calendaring, filing notices of appearance, arranging for telephonic appearances, filing other pleadings, correspondence, court errands, arranging for transcripts, organizing files, updating service lists, compiling a case index, document coordination and other similar work. Greenberg Traurig, reporting in dollars, incurred \$224 for reviewing the docket, accessing dockets and similar charges. None of that work pertains to the buyer protection of the break-up fee. Baker Botts reports 38.4 hours attending to bankruptcy matters, including research, other than the committee's plan with the Comm South letter agreement. Greenberg Traurig reports \$15,641 for those matters. In addition, Greenberg Traurig incurred \$1,886.75 of fees for representation and communication with Comm South necessary for Comm South's business objectives and strategy, but not for the submission of the letter agreement. This work includes internal corporate matters, such as a review and revision of the Comm South articles of incorporation and other organization documents, regulatory matters, client communication and client status reports and conferences. The buyer protection of the break-up fee covers Comm South's expenses for negotiating, drafting, submitting and monitoring in court the

letter agreement, but not for internal Comm South matters, such as corporate structure and communication.

The court therefore considers only the fees and expenses pertaining to preparing, negotiating and drafting the offer to purchase and letter agreement, reviewing and monitoring the committee's plan incorporating that agreement, preparing for and attending hearings authorizing the filing of the committee plan with the Comm South agreement, preparing for and attending the confirmation hearing on the committee's plan, monitoring the impact on the committee's plan of the related bidding procedures on the debtors' motion to sell, preparing the asset purchase agreement and preparing and prosecuting the application for payment of the break-up fee.

These fees and expenses must be reasonable. Counsel may perform services at the request of Comm South. Regardless of what Comm South and its counsel agreed concerning the payment for those services, the court must determine whether it is reasonable to include the fees in a break-up fee to be paid by a bankruptcy estate as a buyer protection. See Brown v. Sullivan, 917 F.2d 189, 192 (5th Cir. 1990). When awarded by a bankruptcy court under the Bankruptcy Code, the standard for reasonableness is a federal standard. Cf. In re Hudson Shipbuilders, Inc., 794 F.2d 1051, 1056 (5th Cir. 1986). To make that determination, the court applies the lodestar analysis. Hensley v. Eckerhart, 461

U.S. 424, 433-34 (1983); Hudson Shipbuilders, 794 F.2d at 1058.

Counsel with Greenberg Traurig charged \$210 or \$335 per hour. Sahagen does not contend that this hourly rate does not reflect what counsel actually charges their clients or that it does not reflect their prevailing community rate for this work. With those hourly rates, except for the break-up fee application, Greenberg Traurig performed \$37,523 worth of services in the categories found by this court to be in connection with the letter agreement and therefore within the court's order for a break-up fee. The court finds this reasonable under the lodestar.

Baker Botts has not provided hourly rates in this application. The record on this application does not reflect the hourly rates charged by that firm as local counsel, although hourly rates had been suggested at a different hearing in the bankruptcy case. Debtors' counsel has been awarded fees based on a blended rate of \$172.80 and the creditors committee's counsel has been awarded fees based on a blended rate of \$209.15 per hour. Greenberg Traurig performed services of lead counsel for Comm South. The court has found hourly rates consistent with that role. But Baker Botts performed more limited monitoring and coordinating services as local counsel. Its hourly rates, given that function, should be consistent with hourly rates for the debtors' counsel and the committee's counsel. The court finds

that sets the parameters in this case for local counsel, considering the hourly rates charged by lead counsel. Except for the break-up fee application, Baker Botts spent 36.1 hours of attorney time in connection with the transaction covered by the break-up fee. At \$209.15 per hour, the committee's counsel's blended hourly rate, the lodestar calculation is \$7,550.

The court finds that, except for the break-up fee application, reasonable fees total \$45,073 (\$37,523 plus \$7,550).

Turning to the break-up fee application, Greenberg Traurig reports \$5,217 of fees and Baker Botts \$6,986 (33.4 hours of attorney and paralegal time at the court determined blended rate of \$209.15). That is not reasonable. At \$335 per hour, the Greenberg firm should not have needed more than 12 hours to request and negotiate the break-up fee, draft and file the portion of the pleadings pertaining to the fee, attend the hearing for court authorization of the fee and draft the implementing order. That results in a lodestar of \$4,020 to obtain court authorization for the fee.

Baker Botts appears to have taken primary responsibility for the motion for order allowing the amount and directing payment of the break-up fees. The firm should not have needed more than two hours to draft and file the motion, with an additional three hours of paralegal time to compile the monthly statements to support the motion. Counsel would have reasonably needed four

hours to respond to the Sahagen objection. That totals nine hours, which at the blended rate of \$209.15, results in a lodestar of \$1,882. The Greenberg firm took the lead at the hearing on the motion. The court finds an additional four hours at \$335 per hour for that work, \$1,340. Based on these findings, the court finds the lodestar for the break-up fee motions to be \$7,242 (\$4,020 plus \$1,882 plus \$1,340).

Baker Botts spent 21.6 hours of attorney time with depositions and other discovery matters pertaining to Sahagen as described in the fee statements. The break-up fee motion did not reasonably involve the deposition of Sahagen. If, however, Sahagen took depositions of Comm South personnel pursuant to his objection, then Comm South would have reasonably incurred fees defending those depositions. The court will modify its order to include fees for defending depositions taken by Sahagen pertaining to the break-up fee upon application within 10 days from the date of entry of this order.

With regard to out-of-pocket expenses, with the motion, Baker Botts reports expenses of \$1,875.15, and Greenberg Traurig reports expenses of \$8,540.83. In the supplement, Baker Botts reports \$1,124.59, and Greenberg, \$343.51. Baker Botts expenses totaled \$2,999.74 and Greenberg, \$8,884.34, for a combined total of \$11,884.08. Of that, the court finds that \$369.22 had not been actually or necessarily incurred. Baker Botts spent \$37 in

taxi and other expenses for the convenience of counsel, not necessary for the letter agreement, and \$77.67 for court documents without a showing of the need to maintain those documents for the letter agreement. The firm reports \$120 for witness fees and mileage Sahagen reports he did not receive and \$134.55 for computer research without a showing of the need for that research for the letter agreement. Greenberg spent \$90 for special clerical services without showing that those expenses were anything other than incurred for the convenience of counsel.

Of the remaining \$11,514.86, the court must recognize that Comm South obtained services not connected with the buyer protection accorded by the court in the break-up fee order. Comm South has not explained which expenses, for example photocopying, went to those other services. The court will infer that at least 10% of the expenses went to those services and will accordingly reduce the expenses by \$1,151.49, resulting in actual and necessary expenses pertaining to work covered by the break-up fee of \$10,363.37. The court draws its inference, in part, upon the travel expenses necessitated for due diligence in making the offer to purchase and for the presentation and prosecution of the letter agreement. Those expenses total about 70% of the \$10,363.37, with the remainder being photocopying, telephone charges and other similar expenses. Under the break-up fee order, Comm South had the burden of proof. Without specifying

the expenses connected to the letter agreement, Comm South must accept inferences drawn by the court. Nevertheless, Comm South may move within 10 days from the date of entry of this order for a modification of this analysis by demonstrating the relationship of each out-of-pocket expense to the letter agreement transaction based on the categories of work covered by the court's buyer protection order as found in this decision.

Based on these findings, the court finds that Comm South incurred reasonable fees and expenses in connection with the transaction (namely, the proposed purchase of assets pursuant to the letter agreement) of \$62,678.37.

Based on the foregoing,

**IT IS ORDERED** that the motion of Comm South Customer Corp. for an order allowing and directing payment of a break-up fee is GRANTED in part.

**IT IS FURTHER ORDERED** that the debtors shall pay Comm South a break-up fee in the amount of \$62,678.37.

The court has entered a separate order consistent with this memorandum opinion and order.

Signed this \_\_\_\_\_ day of December, 2000.

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Steven A. Felsenthal  
United States Bankruptcy Judge





